
U.S. Department of Labor
Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Boston, Massachusetts 02109

Case No. 93-ERA-25

In the Matter of:

EDWARD P. HOLUB,
Complainant

v.

H. NASH BABCOCK, BABCOCK & KING, INC., FIVE STAR PRODUCTS, INC., U.S. GROUT CORP., U.S. WATERPROOFING DIV., U.S. HIGHWAY PRODUCTS, INC., THE NOMIX CORP., THE NASH BABCOCK ENGINEERING COMPANY, CONSTRUCTION PRODUCTS RESEARCH, INC., INTERNATIONAL CONSTRUCT-TON PRODUCTS RESEARCH, INC., FIVE STAR CONSTRUCTION PRODUCTS CANADA, INC., THE BABCOCK CORPORATION,
Respondents

Appearances:

George W. Baker, Esq.
Bentley, Mosher & Babson, P.C.
For Complainant

Harold J. Pickerstein, Esq.
Trager and Trager
Michael F. McBride, Esq.
LeBoeuf, Lamb, Greene and MacRae
For Respondents

Before: JOAN HUDDY ROSENZWEIG
Administrative Law Judge
United States Department of Labor

DISCOVERY ORDER

In furtherance of the Complaint in the above-captioned case, on June 1, 1993,

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[Page 2]

Complainant filed a request for production, including "Schedule A," which contains 34 requests for various documents, as well as a request to take the depositions of 31 of the Respondents' employees upon Respondents' compliance with the requests for production. For their part, on June 16, 1993, Respondents filed a motion for a discovery conference; objections to and responses to Complainant's requests for production; and two motions for protective orders. On June 18, 1993, Complainant filed objections to Respondents' motions for protective orders, and on June 29, 1993, Complainant filed a supplement to its objection to the motion for the protective order. Thereafter, on July 8, 1993, Complainant filed a motion to compel; and on January 18, 1994,

Complainant filed an additional motion to compel compliance with production. On January 18, 1994 Complainant filed a supplement to its objection to Respondents' motion for protective order, and on February 3, 1994, Respondents filed responses to Complainant's motion to compel compliance with production.

In view of the nature and breadth of Respondents' objections to the Complainant's discovery requests, which shall be set forth *infra*, it is appropriate to begin the discussion with a citation of *Hickman v. Taylor,* 329 U.S. 495 (1947), in which the Supreme Court stated as follows:

> The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under prior federal practice, the pre-trial functions of noticegiving issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need to be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

Id. at 329 U.S. 495, 500. As noted by Wright and Miller, discovery has three purposes:

[Page 3]

> (1) To narrow the issues, in order that at the trial it may be necessary to produce evidence only on a residue of matters that are found to be actually disputed and controverted.
> (2) To obtain evidence for use at the trial.
> (3) To secure information about the existence of evidence that may be used at the trial and to ascertain how and from whom it may be procured, as for instance, the existence, custody, and location of pertinent documents or the names and addresses of persons having knowledge of relevant facts.

WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2001 (1970).

The *Hickman v. Taylor* Court also spoke to the issue of the scope of discovery:

> [T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.

Hickman v. Taylor, 329 U.S. at 507-508.

Rule 26(b), which governs discovery scope and limits, addresses the issue of scope as follows:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FED.R.CIV.P. 26(b)(1). As to limitations, the rule states as follows:

[Page 4]

> The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking

> discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c) ["Protective Orders"].

Id. As alluded to above, the courts have construed Rule 26 as permitting liberal discovery, holding that discovery must be related to the subject matter of the action rather than circumscribed by a particular pleading. *See generally United States v. I.B.M. Corp.,* 66 F.R.D. 180 (S.D.N.Y. 1974). Further, the discovery sought need not be specifically relevant in the first instance; rather, it is sufficient that the requested discovery lead to factual matter that is relevant to the proceeding. In *Mallinckrodt Chemical Works,* the court considered Rule 26(b), and stated as follows:

> The parameters of relevance in the context of any litigation is necessarily imprecise. Most authorities admit that it is impossible to formulate a general rule defining the word "relevance." (Citations omitted] Rule 26(b)(1) makes it clear that admissibility at trial is not a limitation on discovery provided that "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." The sweeping scope of this language led one distinguished commentator to suggest that "discovery should be relevant where there is *any possibility* that the information sought may be relevant to the subject matter of the action." [Citation omitted] (Emphasis added).

Mallinckrodt Chemical Works v. Goldman, Sachs & Co., 58 F.R.D. 348, 353 (S.D.N.Y. 1973). The *I.B.M.* case, cited above, also provides a useful discussion as to scope:

> The broad scope of discovery . . . is also reflected in an opinion by Judge Leahy shortly after the adoption of the Federal Rules of Civil Procedure. In *Hercules Powder Co. v. Rohm & Haas Co.,* 3 F.R.D. 302 (D.Del. 1943), Judge Leahy stated as follows:
> "Unless it is palpable that the evidence sought can have no possible bearing upon the issues, the spirit of the [then-]new rules calls for every relevant fact, however remote, to be brought out for the inspection not only of the opposing party but for the benefit of the court which in due course can eliminate those facts which are not to be considered in determining the ultimate issues. *Id.* at 304."

United States v. I.B.M. Corp., 66 F.R.D. at 186, fn.4. Finally, at least in terms of how courts view the respective burdens on parties in discovery disputes, *Fonseca v. Regan,* 98 F.R.D. 694 (E.D.N.Y. 1983), is instructive:

[Page 5]

> The basic purpose of interrogatories is to discover facts under oath or learn where facts may be discovered and to narrow the issues in the case for trial. *Life Music,*

> *Inc. v. Broadcast Music, Inc.,* 41 F.R.D. 16, 26 (S.D.N.Y. 1966); *U.S. v. 216 Bottles, More or, Less,* etc., 36 F.R.D. 695, 701 (E.D.N.Y. 1965); *United States v. Grinnell Corp.,* 30 F.R.D. 358, 361 (D.R.I. 1962). If a party objects to interrogatories, the burden falls on that party to convince the court that the interrogatories are improper and need not be answered. *See Roesberg v. Johns-Manville Corp.,* 85 F. R. D. 292 (E. D. Pa. 19 8 0) *; In re Folding Carton Antitrust* Litigation, 83 F.R.D. 260 (N.D.Ill. 1979).

Id. at 700.

Turning to the Complainant's production requests, the Respondents' particular objections thereto and Complainant's responding motion to compel, I have found it helpful to categorize them by the nature of the objection raised. With respect to ten of the requests for production, the Respondents' have lodged objections of relevance, overbroad and unduly burdensome, and have additionally characterized certain of these production requests as "vague." Three objections go to relevance alone.

Relevance, of course, in a discovery context, goes to the nature, or *subject matter,* of the complaint, rather than to its boundaries. In addition, as was noted in the previously issued Order, "[t]he law is well settled regarding the appropriateness of extensive discovery in employment discrimination cases. McDonnell *Douglas Corp. v. Green,* 411 U.S. 792, 804-05 (1973). *See generally* 29 C.F.R. § 18.14. Further, the courts have held that liberal discovery in these cases is warranted." (*Order*, June 24, 1993, sl. op. at 16). There is another point to be made, alluded to above, that involves what might be termed the *sufficiency* of the Respondents' objections, and there is case law which speaks directly to this issue. In what might be broadly termed an asbestos product-liability case, the district court was required to rule on objections to various interrogatories, the nature of the objections being strikingly similar to those under consideration herein. The court noted that the plaintiffs had filed fifty-seven separate interrogatories with all defendants, of which one (GAF Corporation), "answered six but objected to the others as 'overly broad', 'burdensome', 'oppressive', 'not reasonably calculated to lead to discoverable evidence' and privileged'. Plaintiffs then moved to compel answers thereto, and the magistrate so ordered." *Roesberg v. Johns-Manville Corp.,* 85 F.R.D. 292, 295 (E.D.Pa. 1980).[1] *Roesberg* continues:

Recently describing the scope of discovery under FED. R. CIV. P. 26(b)(1), this Court ruled that[:]

> [r]elevancy, and to a lesser extent burdensomeness, constitute the principal inquiry in ruling upon objectionsto interrogatories. *Superior Coal Co. v. Ruhrkohle, A.G.,* 83 F.R.D. 414, 422 (E.D.Pa. 1979), *In re United States Financial Securities Litigation,* 74 F.R.D. 497, 498 (S.D.Cal. 1975), *Greene v. Raymond,* 41 F.R.D. 11,

> 14. (D.Colo. *1966), Lumberman's Mutual Casualty Co. v. Pistorino & Co.,* 28 F.R.D. 1, 2 (D.Mass. 1961). In the interests of a fair trial, eliminating surprise and achieving justice, *United States v. Purdome*, 30 F.R.D. 338, 340 (W.D.Mo. 1962), *Stonybrook Tenants Association, Inc.* v. *Alpert,* 29 F.R.D. 165, 168 (D.Conn. 1961), relevancy, construed liberally, creates a broad vista for discovery, *Oppenheimer Fund Inc. v. Sanders,* 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978), *Schlagenhauf v. Holder*, 379 U.S. 104, 121, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964), *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947) . . . and makes trial "less a game of blind man's bluff and a more fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Proctor & Gamble Co.,* 356 U.S. 677, 682, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958).

Id. at 295--96. Considering the time frames set forth in Plaintiff Roesberg's interrogatories, the court stated that a request for discovery should be considered relevant, "'if there is any possibility that the information sought may be relevant to the subject matter of the action. . . . Discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of the action. . . . The scope of examination by interrogatories should not be curtailed unless the information sought is clearly irrelevant. *Miller v. Doctor's General Hospital,* 76 F.R.D. 136, 138-39 (W.D.Okla. 1977)(citations omitted). See *also In re Folding Carton Antitrust Litigation*, 83 F.R.D. 251, 254 (N.D.Ill. 1978), United *States v. IBM Corp.,* 66 F.R.D. 215, 218 (S.D.N.Y. 1974), *Cleo Wrap Corp. v. Elsner Engineering Works, 59* F.R.D. 386, 388 (M.D.Pa. 1972)." *Id*.

The court noted that the defendant in *Roesberg* objected to a particular interrogatory as "overly broad, burdensome, oppressive and irrelevant, a complaint which [defendant] GAF echoes with virtually every other interrogatory. To voice a successful objection to an interrogatory, GAF cannot simply intone this familiar litany. Rather GAF must show specifically how, despite the broad and liberal construction afforded the federal discovery rules, each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive, *Trabon Engineering Corp. v. Eaton Manufacturing Co.,* 37 F.R.D. 51, 54 (N.D.Ohio 1964), *Stanley Works v. Haeger Potteries, Inc.*, 35 F.R.D. 551, 555 (N.D.Ill. 1964), by submitting affidavits or offering evidence revealing the nature of the burden. Leumi *Financial Corp. v. Hartford Accident & Indemnity Corp.,* 295 F.Supp. 539, 544 (S.D.N.Y. 1969), *Wirtz v. Capital Air Service, Inc.,* 42 F.R.D. 641, 643 (D.Kan. 1967)." *Id.* at 296--97. The court continued:

> The court is not required to "sift each interrogatory to determine the usefulness of the answer sought." *Klausen v. Sidney Printing & Publishing Co.,* 271 F.Supp. 783, 784 (D.Kan. 1967). *See also Hoffman v. Wilson Line, Inc.*, 7 F.R.D. at 74. The detail in the complaint specifies the necessary relevance of the interrogatories. *In re Folding Carton Antitrust Litigation,* 83 F.R.D. at 254, *McClain v. Mack Trucks,* Inc., 85 F.R.D. at 57.

> The burden now falls upon GAF, the party resisting discovery, to clarify and explain its objections and to provide support therefor. *Gulf Oil Corp. v. Schlesinger,* 465 F.Supp. 913, 916--17 (E.D.Pa. 1979), *In re Folding Carton Antitrust Litigation,* 83 F.R.D. 260, 265 (N.D.Ill. 1979), *Robinson* V. *Magovern*, 83 F.R.D. 79, 85 (E.D.Pa. 1979), *Flour Mills of America, Inc. v. Pace*, 75 F.R.D. 676, 680 (E.D.Okla. 1977). The number and detailed character of interrogatories is not alone sufficient reason for disallowing them unless the questions are "egregiously burdensome or oppressive." Wirtz *v. Capital Air Service, Inc.,* 42 F.R.D. at 643. *See also Anderson Co. v. Helena Cotton Oil Co.,* 117 F.Supp. 932, 941 (E.D.Ark. 1953). Nor is the fact that answering the interrogatories will require the objecting party to expend considerable time, effort and expense, Wirtz *v. Capital Air Service, Inc.,* 42 F.R.D. at 643, or may interfere with defendant's business operations. *In re Folding Carton Antitrust Litigation,* 83 F.R.D. at 254. *See also Klausen v. Sidney Printing & Publishing Co.,* 271 F.Supp. at 784, *Rogers v. Tri-State Materials Corp.,* 51 F.R.D. 234, 245 (N.D.W.Va. 1970), *Cf. In re United States Financial Securities Litigations, supra* (interrogatories three hundred eighty-one pages long and two inches high containing almost three thousand questions and costing over twenty-four thousand dollars to answer held unduly oppressive); *Alexander v. Rizzo,* 50 F.R.D. 374 (E.D.Pa. 1970)(objections to interrogatories denied even though answering would require hundreds of employees many years and hours to "unearth" answers). *Krantz v. United States,* 56 F.R.D. 555 (W.D.Va. 1970)(fifteen hundred interrogatories held oppressive), *Frost v. Williams*, 46 F.R.D. 484 (D.Md. 1969)(two hundred interrogatories held oppressive), *Breeland v. Yale and Towne Manufacturing Co.*, 26 F.R.D. 119 (E.D.N.Y. 1960)(two hundred interrogatories held oppressive). General objections without specific support My result in waiver of the objections. *In re Folding Carton Antitrust Litigation,* 83 F.R.D. at 264 . . . .

(Emphasis added). Id. at 297. Having provided the "black letter law" regarding the nature of interrogatories as well as the sufficiency of any objections thereto, including the possibility of waiver of objections where such objections are insufficient, the *Roesberg* court nonetheless proceeded to address the various objections raised therein, albeit according them "short shrift," so to speak. In this, this court shall follow the lead of *Roesberg.*

The Complainant herein made three requests for production to which the Respondents objected solely on the basis of relevance. Request for production number 7 (a) asks that the Respondents provide "[a]ll of Respondents' correspondence and memoranda from 1983 to the present time concerning . . . [the] United States Nuclear Regulatory Commission, including but not limited to all references to its investigation of the Respondents from 1992 to the present time." The Respondents proffer only the following objection: "The Respondents object to [this] request on the grounds that the documents requested have no relevance regarding the allegations set forth in [Complainant's) Complaint." The Complainant responds that, " [t]hese documents are necessary to show how the Respondents' business is regulated by the NRC in their sales to nuclear power facilities, and how critically disruptive to their business was the Complainant Holub's

cooperation with the NRC. This serves as evidence of the strong motive that the Respondents had in retaliating against Holub for his cooperation."

[Page 8]

The Complainant asserts that the reasons relied upon by Respondents for discharging him are pretextual, i.e., that what an Employer relies on to support the discharge or other adverse action did not, in fact occur or exist, or was not, in fact, relied on. *See Wright Line*, 251 NLRB 1083 (1980), *aff'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Evidence of motive in such cases goes to the issue of what the Respondents did rely on when they discharged the Complainant herein. To borrow a phrase from the *Roesberg* court, "[t]he relevance of this (request] to (Complainant's case] is obvious." *Roesberg,* 85 F.R.D. at 297. Respondents' objection is accordingly overruled and Complainant's motion to compel in this regard is granted.

Request for production number eight asks that the Respondents provide, "[a]ll advertisements, correspondence, memoranda, invoices, acknowledgements, and printed packaging concerning sales of the Respondents' products to directly or indirectly to nuclear power facilities from 1983 to present." Respondents state only that they "object to paragraph 8..... in that the documents requested have no relevance regarding the allegations set forth in (Complainant's) Complaint." Complainant responds that, "[t]his information is necessary to establish the jurisdictional requirements of Title 42 U.S.C. § 5851, that the Respondents sell products to nuclear power facilities or their suppliers, contractors or subcontractors." The relevance of this request to the Complainant's case is obvious. Respondents' objection is accordingly overruled and Complainant's motion to compel in this regard is granted.

Request for production number 23 asks that the Respondents "provide all memoranda concerning the corporate structure of the Respondents and the way they interact from 1983 to present." Respondents state only that they object on the grounds that, "the documents requested have no relevance regarding the allegations set forth in the . . . Complaint." The Complainant responds that, "[t]he Respondents consist of a group of related entities all working at the same office with overlapping officers, directors and employees. For instance, with reference to Exhibit A of the Complaint, Holub was suspended on December 22, 1992 by William N. Babcock, President of Five Star Products, Inc., and then in Exhibit D, fired on January 22, 1993 by H. Nash Babcock, president of Construction Products Research, Inc. It is important . . . to know how these entities interact and who was responsible for what." The relevance of this request to the Complainant's case is obvious. Failing to name a particular respondent, for example, could provide the basis for a motion to dismiss. In addition, if Complainant ultimately makes out a case, the issue of which entity or entities bear liability will arise. *See generally Milner* v. *National School of Health Technology,* 73 F.R.D. 628, 631 (E.D.Pa,. 1977), citing *Tippett v. Liggett & Myers Tobacco Co.,* 316 F.Supp. 292, 296 (M.D.N.C. 1970), and *Gutowitz v. Pennsylvania R.Co.,* 7 F.R.D. 144 (E.D.Pa. 1945). Respondents'

objection is accordingly overruled and Complainant's motion to compel in this regard is granted.

Request for production number 12 asks that the Respondents provide all of their "correspondence and memoranda concerning Respondents' office and laboratory procedures and forms for doing business and laboratory work from 1983 to present."

[Page 9]

Respondents object to this request, stating only that, "the documents requested have no relevance regarding the allegations set forth in..... (the] Complaint and further more, the request is overbroad, unduly burdensome and vague." Complainant responds as follows:

> This request will discover whether or not the Respondents had any written instructions on how laboratory notebooks were to be filled out, who would sign them, and if they were witnessed in any way. The failure to witness notebooks was given as a reason to fire Holub. Similarly, this request would also discover when, who and how MSDS (material safety data sheet] forms were to be prepared, which was another pretext used to fire Holub. This request will also [e]licit a general view of how strictly the Respondents controlled and supervised their own paperwork. This is relevant in determining whether Holub Is firing for his alleged paperwork failures was typical or atypical of the Respondents' attitude with regard to its paperwork.

The relevance of this request to the Complainant's case is obvious. Further, and based on the cases cited above, I find the request neither unduly burdensome nor oppressive. Finally, with respect to the assertion that the request is vague, Respondents fail to explain in what regard the request meets some unexpressed vagueness standard. This issue was raised in *Roesberg.* In that case, the defendant (GAF) at least pointed out which portion of the interrogatory it found vague. The court held that, because that plaintiff did not assign a particular meaning to the phrases at issue, "the ordinary, everyday usage and meaning must have been intended. [Footnote omitted][Citations omitted] . . . . The requirement that interrogatories be definite is-satisfied so long as it is clear what the interrogatory asks. *Struthers Scientific & International Corp. v. General Foods Corp.,* 45 F.R.D. 375, 379 (S.D.Tex. 1968)." *Roesberg v. Johns-Manville Corp.,* 85 F.R.D. at 298. I find that Complainant's request for production in this regard is sufficiently definite to satisfy *Roesberg*. Respondents' objection is accordingly overruled and Complainant's motion to compel in this regard is granted.

Complainant's request for production number three, requests that the Respondents provide "[a]ll correspondence and memoranda concerning the Respondents' MSDS from 1983 to the present, including but not limited to requests by customers of the Respondents for MSDS or any problems and complaints about the MSDS." Respondents object, stating only that, "the documents requested have no relevance regarding the

allegations set forth in the [Complainant's] Complaint and furthermore, the request is overbroad and unduly burdensome." The Complainant responds as follows:

> The Respondents contend that the Complainant was fired because he failed to update material safety data sheet (MSDS) forms. See Exhibit D to the Complaint. The Complainant Holub denies that he was ever assigned the job of making sure that all of the MSDS forms were updated. Holub contends that every time he was asked, he complied with every request to help fill out an MSDS form. The Respondents have also contended that they had problems with customers because certain MSDS forms were not properly updated.
> The production request simply asks the Respondents to produce all materials

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[Page 10]

> which might indicate who was in charge of updating the MSDS forms, when and if Holub was ever asked to do updating, and what problems or complaints the Respondents had from customers. This request falls directly within the issues raised by the Respondents in justifying Holub's firing. These documents are necessary for Holub's defense against the Respondents' charges.

The relevance of this request for production is obvious. Further, and based on the above case citations, I find that this request is neither overbroad nor unduly burdensome. Respondents I objection is accordingly denied and Complainant's motion to compel in this regard is granted.

Complainant's request for production number 7(b), asks that Respondents provide all correspondence and memoranda from 1983 to the present time concerning "[q]uality assurance, including 'all editions of all quality assurance manuals, and all test results." Respondents object on the grounds that, "the documents requested have no relevance regarding the allegations set forth in..... (the] Complaint and furthermore, the request is vague and unduly burdensome." The Complainant responds as follows:

> The Respondents gained an important market advantage in stating to potential nuclear reactor facilities that its quality assurance system meets "the requirement of 10 C.F.R. 50, Appendix B, Quality Assurance Criteria for Nuclear Power Plants as required by the Nuclear Regulatory Commission." (From page 26 of Respondents' booklet entitled "A Professional's Handbook on Grouting Concrete Repair and Waterproofing,".....). After the NRC's search warrant inspection, the Respondents stated in a memo to all employees dated September 9, 1992..... that it could no longer claim compliance with 10 C.F.R. 50.
> The key to the Complainant's disclosure to the NRC was that the Respondents' products, which were going to be used in critical parts of nuclear reactors, were not being properly tested. The Respondents' Quality Assurance Manual, and how it was and was not being followed, was important to the NRC and its examination of the Respondents' quality assurance. Consequently, the correspondence bears directly on this issue of the Respondents' retaliatory motive for firing Holub because of his cooperation with the NRC. The quality assurance manual, a

photograph of which appears in the Respondent's own booklet on page 26, is not vague or unduly burdensome.

The relevance of this request to Complainant's case is obvious. Further, I find the request neither vague nor unduly burdensome. Respondents' objection is accordingly denied and Complainant's motion to compel in this regard is granted.

Complainant's request for production number 7 (c), asks that Respondents provide all of their correspondence and memoranda from 1983 to the present time concerning "[a]ll references to Appendix B to title 10 C.F.R. Part 50, and/or to Title 10 C.F.R. Part 21." Respondents object on the grounds that, "the documents requested have no relevance regarding the allegations set forth in [Complainant's] Complaint and furthermore, the request is vague and unduly burdensome. Complainant responds as follows:

[Page 11]

After the NRC search warrant inspection on September 1, 1992, the Respondents had to stop advertising that their product's quality assurance program met the requirements of 10 C.F.R. (Part] 50. It is important to determine what business impact this had on the Respondents by reviewing all references that the Respondents made before and after to this regulation. Such documents would be evidence of the Respondents' motive for firing Holub due to the traumatic effect that this NRC disclosure had on the Respondents' business.

The relevance of this request for production is obvious. Further, I find the request neither vague nor unduly burdensome. Respondents' objection is accordingly denied and Complainant's motion to compel in this regard is granted.

Complainant's request for production number 7 (d) , asks that the Respondents provide all of their correspondence and memoranda from 1983 to the present time concerning, "[f]ailures of Respondents' products reported by Respondents' customers or discovered by Respondents, and all investigation of such failures. " The Respondents object on the grounds that the documents have no relevance regarding the Complaint allegations, and further, that the request is vague and unduly burdensome. The Complainant responds, stating that, "Complainant Holub disclosed to the NRC[,] product failures that Respondents I customers experienced when using the Respondents' products. Such documentation of customer complaints would be evidence of Respondents I motive in firing Holub in retaliation for his giving this important information to the NRC. " The relevance of this request to Complainant's case is obvious, and is neither vague nor unduly burdensome. Respondents' objection is accordingly denied and Complainant's motion to compel in this regard is granted.

Complainant's request for production number 14, asks that Respondents provide, "[a]ll of Respondents' sign-in registers, day books and other memoranda which keep track of the presence of Respondents' employees for 1992. " Respondents object on the grounds that, "the documents requested have no relevance regarding the allegations set forth in

(Complainant's] Complaint and furthermore, the request is overbroad, unduly burdensome and vague." Complainant states as follows:

> Counsel for the Respondents stated to the hearing officer of the Connecticut Unemployment Commission that Holub had failed to meet all the research and development goals set for 1992. During 1992, Holub was unusually busy in traveling on business trips and preparing for out-of-town testimony in a patent infringement lawsuit. Such day book registers would indicate the specific days that Holub was present at the Respondents' building in Fairfield, Connecticut, and where he was if not at the building.

The relevance of this request for production to Complainant's case is obvious. Further, the request is neither overbroad nor unduly burdensome. Respondents' objection is accordingly denied and Complainant's motion to compel in this regard is granted.

Complainant's request for production number 17, asks that Respondents

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[Page 12]

provide, "[a]ll references in memoranda prepared by the Respondents which describe Construction Products Research, Inc. as being "independent" from the other 'Respondents." Respondents object on the grounds that, "the documents have no relevance regarding the allegations set forth in (Complainant's] Complaint and furthermore, the request is overbroad, unduly burdensome and vague." Complainant asserts that, " . . . these documents go to the issue of the Respondents' credibility, and whether or not the Respondents asserted that Construction Products Research, Inc. was independent from the Respondents." The relevance to the Complainant's case is obvious. Further, the request is neither overbroad nor unduly burdensome. Respondents' objection is accordingly overruled and Complainant's motion to compel in this regard is granted.

Complainant's request for production number 20, asks that the Respondents provide, "[a]ll correspondence, invoices, acknowledgements and other memoranda concerning the order and subsequent return of the Curamold Curing Tank 110/60 which was returned in 1992." Respondents object to this request on the grounds that, "the documents requested have no relevance regarding the allegations set forth in the (Complainant's] Complaint and furthermore, the request is overbroad and unduly burdensome." The Complainant responds as follows:

> Paragraph 6 of the Complaint states that Holub reported to the NRC his doubts and concerns he had about the Respondents' quality assurance, testing programs, and the adequacy of the products being sold to nuclear power plants. Holub ordered this curing tank because he knew that the way the Respondents were testing their products was inadequate. After the curing tank arrived, the Respondents returned it to the dealer, over the objections of Holub, because it was

too expensive. This production request goes to the issues present in the Complaint, and is quite specific.

The relevance of this request to the Complainant's case is obvious. Further, the request is neither overbroad nor unduly burdensome. Respondents' objection is accordingly overruled and Complainant's motion to compel in this regard is granted.

Complainant's request for production number 24, asks that the Respondents provide, "[a]ll sales literature for all of the Respondents' products from 1983 to the present time." Respondents object on the grounds that, "the documents requested have no relevance regarding the allegations set forth in the [Complainant's] Complaint and furthermore, the request is overbroad and unduly burdensome." The Complainant asserts that, "[t]his production request would facilitate a review of all references made in any sales literature concerning the Respondents' products use in or suitability for nuclear power facilities, which is an issue raised by the Complaint." The relevance of this request to the Complainant's case is obvious. Further, the request is neither overbroad nor unduly burdensome. Respondents' objection is accordingly overruled and Complainant's motion to compel in this regard is granted.

Complainant's request for production number 27, asks that Respondents provide, "[a]ll correspondence and memoranda concerning the Respondents' communications

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with customers in response to the August and September 1992 NRC inspections, and to the announcement to the nuclear industry that the NRC was denied full access to the Respondents' facilities." Respondents object on the grounds that, "the documents requested have no relevance regarding the allegations set forth in the (Complainant's] Complaint and furthermore, the request is overbroad and unduly burdensome." The complainant responds that, "[t]his request would reveal the consequences that the NRC inspections and announcement had on the Respondents' customers, and provide evidence of a retaliatory motive for the firing of Holub after his cooperation with the NRC was made known to the Respondents." The relevance of this request to the Complainant's case is obvious. Further, the request is neither overbroad nor unduly burdensome. Respondents I objection is accordingly denied and Complainant's motion to compel in this regard is granted.

Complainant's request for production number 31, asks that Respondents provide, "[a]ll certifications of test results on the Respondents' products signed by Edward P. Holub since 1983." The Respondents object on the grounds that, "the documents requested have no relevance regarding the allegations set forth in the [Complainant's] Complaint and furthermore, the request is overbroad and unduly burdensome. " The Complainant states that, "[t]his production request goes to the issue of what test results Holub was being asked by the Respondents to sign. This goes to the issue raised by Paragraph 6 of the Complaint, that Holub had doubts and concerns about the Respondents' quality assurance,

testing programs, and the adequacy of the products being sold to nuclear power plants." This request for production is clearly relevant. Thus, while a complaint made to a regulatory body covered by the Act need not be shown to be valid, it should be made in good faith. *See generally* STEPHEN M. KOHN, THE WHISTLEBLOWER LITIGATION HANDBOOK: ENVIRONMENTAL, HEALTH AND SAFTY CLAIMS 47 (1990). Further, the request is neither overbroad nor unduly burdensome. Respondents' objection is accordingly denied and Complainant's motion to compel in this regard is granted.

Complainant has also requested the production of certain documents concerning which Respondents assert, *inter alia*, that they do not maintain custody and control and object to their production on that basis. The law concerning production of documents in this regard is clear. United *States v. I.B.M. Corp.,* 477 F.Supp. 698 (S.D.N.Y. 1979), states as follows:

> A rule 45 subpoena, as well as a rule 34 document request, may reach only those documents within the possession, custody or *control* of the subpoenaed person. See 5A MOORE's FEDERAL PRACTICE ¶ 45.05[2] at 45-32 n.6a (1979). The question here is one of "control," not "possession." [Footnote omitted]. That documents demanded by the government may reside in files other than [the subpoenaed person's] is beside the point if [that person] has control over such files. *See, e.g., In re Folding Carton Antitrust Litigation,* 76 F.R.D. 420, 423 (N.D.Ill. 1977) (rule 34 document request) ("The test is whether the party has a legal right to control . . ."); *Bifferato v. States Marine Corp., 11* F.R.D. 44, 46 (S.D.N.Y. 1951)(rule 34 document request) ("The true test is control and not possession"); *Bough v. Lee*, 29 F. Supp. 498, 501 (S.D.N.Y.) (subpoena) ("Control, not mere possession is the determining factor").

[Page 14]

(Emphasis in original) Id. at 698--99. Holding that the burden of production to be imposed was not unreasonable and oppressive, the court made this observation:

> [The subpoenaed individual] and IBM complain that this burden is increased by the demand of the subpoena in numerous instances for the original and all copies of responsive documents. Plaintiff has modified that instruction to require only one legible copy of each responsive document . . . .

Id. at 699, fn.3. *See generally Petruska v. Johns-Manville*, 83 F.R.D. 32 (E.D.Pa. 1979) ("But it is 'not usually a ground for objection that the information is equally available to the interrogator or is a matter of public record.' 8 WRIGHT & MILLER, FED. PRAC. & PROCED., CIVIL § 2014 at 111. ").

There is one additional case with relevance here. *Bowman v. Consolidated Rail Corp.,* 110 F.R.D. 525 (N.D.Ind. 1986), involved a railroad employee who suffered an accidental on-the-job injury. Conrail sought certain disability documents from Bowman,

who declined to produce them on the ground that they were no longer in his possession because they had been submitted to the Railroad Retirement Board. Bowman thereupon offered the suggestion that Conrail could obtain these documents elsewhere, i.e., the Railroad Retirement Board. The court stated as follows:

> A party from whom discovery is sought must have possession, custody or control of the materials sought. Fed.R.Civ.P. 34(a). The party need not, however, have actual physical possession. If the party to whom the request for production is made has the legal right to obtain the documents sought to be produced, discovery can be had, even in the absence of actual possession. (Citing *In re Folding Carton Antitrust Litigation*, 76 F.R.D. 420 (N.D.Ill. 1977)]."

(Emphasis supplied). Id. at 526.

Complainant's request for production number one, asks that Respondents provide all of Respondents' laboratory books for tests and other scientific and technical work from 1983 to present. Respondents object on the grounds that, "the documents sought are not in the custody and control of the Respondents and are in fact in the possession of the Nuclear Regulatory Commission." The Complainant responds as follows:

> The laboratory notebooks are important to this case because in his letter firing the Complainant on January 22, 1993 [Complaint Exhibit D], Respondent H. Nash Babcock stated as one of the reasons for the firing was a failure of Holub to witness the laboratory books: >
> "Since the time that we sent you our letter of January 18, 1993, we

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[Page 15]

> have now determined that you have failed for several years to sign or witness laboratory books for tests, or other scientific or technical work performed by you personally or under your direction or other of your employees . . . . This failure to sign and date, or witness, those books was inexcusable, and those two failures only add to the failures that we have previously addressed in our letter of January 18 to you."
> The Complainant Holub contends that for years Babcock was aware that Holub had not signed or witnessed laboratory notebooks, and that this excuse was created as a pretext in January 1993 to fire him.
> Now the Respondents say that the notebooks are not in their possession, but are in the possession of the NRC. The Respondents' objection raises an important issue of the credibility of their response.
> It is true that NRC took away a small portion of the Respondents' laboratory notebooks during its search warrant examination of the Respondents' facilities on September 1, 1992. However, photocopies of the seized notebooks were given by the NRC to the Respondents by the end of 1992. Consequently, the Respondents now have in their possession the notebooks that were never seized by the NRC, and photocopies of the notebooks which were seized.

> The whole premise of Babcock's letter of January 22, 1993, quoted above, is that between January 18, 1993 and January 22, 1993, he had examined laboratory books and "now determined" that Holub had failed to witness or sign them. If these books were in the possession of the NRC, what was Babcock looking at in January 1993?
> Additionally, in the Respondents I Memorandum of Fact and Law dated March 26, 1993, the Respondents state that "early this year" H. Nash Babcock reviewed a "full case of laboratory record books which covered the period from 1984 to early 1989."
> Unless the Respondents can say that since January 1993, the NRC has taken away all of their laboratory notebooks and photocopies, their objection to [this production request] should be denied as it contradicts the Respondents own version of the facts.

It is implicit in the Complainant's response to Respondents' objection that photocopies of the notebooks are acceptable. *United States v. I.B.M.* 477 F.Supp. at 699 n.3. I also note that Respondents do not object to this production request on relevancy grounds. As to the "control" issue, Complainant's assertions are compelling, i.e., that Respondents examined the laboratory notebooks -- or copies thereof -- while they were supposedly in the possession and control of the NRC. I point out that, "[a]nswers must be complete, explicit and responsive. If a party cannot furnish details, he should say so under oath, say why and set forth the efforts he used to obtain the information. He cannot plead ignorance to information that is from sources within his control. If a party is a corporation, information within its control must

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be supplied. 4A MOORE's FEDERAL PRACTICE ¶ 33.26. However, where the answer states that no record exists, the court cannot compel the impossible. *Moss v. Lane Co.,* 50 F.R.D. 122, 128 (W.D.Va.), *aff'd in part, remanded in part,* 471 F.2d 853 (4th Cir. 1973). Therefore, a sworn answer indicating a lack of knowledge is not objectionable. *Brennan v. Glenn Falls* H*at. Bank & Trust Co.,* 19 F.R.Serv.2d 721, 722-23 (N.D.N.Y. 1974)." *Milner v. National School of Health Technology,* 73 F.R.D. at 632--33. An assertion, without more, that the documents sought are in the custody and control of the NRC, in light of Respondents' January 18 and January 22, 1993 letters to Complainant that the laboratory notebooks were reviewed after the search warrant seizure, strains credibility very nearly to the breaking point. Further, in the absence of a sworn affidavit that Respondents have neither the notebooks themselves, nor copies thereof, and that the Nuclear Regulatory Commission has refused to provide copies of the notebooks it has seized (*see Bowman v. Consolidated Rail Corp. 110* F.R.D. at 526), I find that Respondents objection has no merit and it is overruled. Complainant's motion to compel in this regard is granted.

Complainant's request for production number nine, asks that Respondents provide, "[t]ranscripts of the depositions and trial testimony of Respondents' officers and

employees in the Quickrete litigation referred to in the Complaint and in the Nomix Corporation v. America Stone-mix, Inc., et al., litigation, Docket Number CAHM-88-1338." Respondents object to this request on the -grounds that, "the documents are not in the custody and control of the Respondents and moreover, the (Complainant] has ample access to obtain this information from the appropriate court." The Complainant responds as follows:

> The transcripts in these patent infringement cases include testimony by H. Nash Babcock and others who introduced into evidence and discussed at length the Respondents' laboratory notebooks. None of these notebooks had been witnessed by Holub or anyone else. Such testimony occurring in 1988 to November 1992, clearly contradicts Babcock's assertion in January 1993 that he had just discovered Holub's failure to witness laboratory notebooks.
> These transcripts, to the extent they are in the possession of the Respondents or the Respondents' patent infringement trial counsel, should be produced by the Respondents.

Once again, Respondents' objection strains credibility. Thus, one would expect that in the course of patent infringement litigation, to which Respondents were parties or a party, that Respondents would have obtained a copy of the trial transcript. Further, one would expect that one's patent attorneys may be considered agents such that Respondents would have control over trial transcripts within the custody of such attorney or attorneys. *Milner v. National School of Health Technology,* 73 F.R.D. at 632. Further, and as noted above, it is not usually a ground for objection that the information is equally available to the interrogator or is a matter of public record. *Petruska v. JohnsManville,* 83 F.R.D. at 35, citing WRIGHT & MILLER.[2] Respondents' objection is accordingly overruled and Complainant's motion to compel in this regard is granted.

[Page 17]

Complainant's request for production number 16, asks that Respondents provide a 1992 memorandum "prepared by Richard Grabowski concerning audit or inspection he conducted of Construction Products Research, Inc." Respondents object on the grounds that, "the documents sought are not in the custody and control of the Respondents and are in fact in the possession of the Nuclear Regulatory Commission. Moreover, the documents requested have no relevance regarding the allegations set forth in [Complainant's] Complaint." The Complainant states as follows:

> The NRC has returned to the Respondents photocopies of all documents it seized in the September 1, 1992 search warrant inspection. Additionally, this memorandum goes to the issue of the credibility of the Respondents, in that this document sought to give the impression that Construction Products Research, Inc. was not only independent of the other Respondents, but was located in another building.

Respondents should make a copy available. *See United States v. I.B.M.,* 477 F.Supp. at 699, n.3. Further, the relevance of this request is obvious. Respondents' objection is accordingly overruled and Complainant's motion to compel in this regard is granted.

Complainant's request for production number 19, asks that Respondents provide all of Respondents' patents which contain Edward P. Holub's name. Respondents object on the grounds that, "the documents requested are public record and the Respondents (sic?] have ample opportunity to obtain this information and are as easily accessible to the [Complainant]." The Complainant responds that, "[t]he Respondents have copies of the patents in their files, or at least in the files of their patent attorneys. These should be produced by the Respondents." The law is clear as to this issue and has been set out at length, above. Respondents' objection is overruled and Complainant's motion to compel in this regard is granted.

Complainant's request for production number 29, asks that Respondents provide, "[a]ll certifications since 1983 that the Respondents' products were being manufactured and controlled in accordance with the requirements of Appendix B to 10 C.F.R. Part 50 and or 10 C.F.R. Part 21." The Respondents object to the request on the grounds that, "the documents sought are not in the custody and control of the Respondents and are in fact in the possession of the Nuclear Regulatory commission." Complainant responds that, "the Respondents have photocopies of all of the documents seized by the NRC, and should produce such photocopies." As noted above, the law is clear as to this issue. Respondents' objection is overruled and Complainant's motion to compel in this regard is granted.

Complainant's request for production number 30, asks that the Respondents provide, "[a]ll purchase orders of Respondents' products since 1983 wherein the buyer specified compliance with Appendix B to 10 C.F.R. Part 50 and/or 10 C.F.R. Part 21." Respondents object on the grounds that, "the documents sought are not in the custody and control of the Respondents and are in fact in the possession of the Nuclear Regulatory Commission." Complainant states that, "the Respondents have photocopies of all of the documents seized by the NRC, and should produce such photocopies." As noted above, the

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law is clear as to this issue. Respondents' objection is overruled and Complainant's motion to compel in this regard is granted.

The following three production requests by Complainant have, in turn, generated a motion for a protective order by Respondents. Request for production number 6, asks that Respondents provide all payroll records from 1983 to the present. Respondents object on the grounds that, "the documents requested have no relevance regarding the allegations set forth in . . . [the] Complaint and furthermore, the request is overburdensome and seeks confidential information. [However, t]he Respondents intend to comply with paragraph 6

insofar as it relates to any payroll records relating to the [Complainant]." Respondents also filed a motion for a protective order which states as follows:

> Pursuant to 2 9 C. F. R. § 18. 15 (a) (6) , the Respondents, H. Nash Babcock, et al., move . . . for an order directing that the [Complainant's] Request for Production filed on May 17, 1993 be limited in the following way:
> That the discovery sought in paragraphs 6, 18 and 26 not be disclosed to the (Complainant] because it involves trade secrets or other confidential research, development or confidential information which is not discoverable by the (Complainant]. Moreover, in support of this Motion for a Protective order, the documents requested in 6, 18 and 26 of Petitioner's Request for Production have no relevance to any of the allegations set forth in Petitioner's complaint.
> WHEREFORE, the Respondents move for a protective order wherein the Administrative Law Judge directs that the information requested in Paragraphs 6, 18 and 26 of [Complainant's] Request for Production not be disclosed to the (Complainant].

The Complainant responds as follows with respect to request for production number 6:

> As the Court is aware from the Complaint, Edward Holub was a chemist for this Respondents for approximately 13 years. On December 22, 1992, he was suspended from his position as Director of Research within hours after he told the Respondents that he had been the one who contacted the NRC earlier in the year. This suspension was followed by firing on January 22, 1993.
> The request for payroll records is necessary and relevant to the issues in this case. In paragraph 10 of the Complaint the Complainant states that on December 22, 1992, William Babcock told Holub that he had performed well over the year, and gave him a bonus and a raise. In fact, the bonus was in the amount of $2,600.00 and the raise was $3,000.00. It was at the close of this meeting that Holub told William Babcock that he had been in contact with the NRC.
> In Paragraph 10 of [the March 26, 1993, Answer], the Respondents deny that Holub was told that he had performed well, and the Respondents..... try to minimize the

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[Page 19]

> significance of Holub's award of a bonus and raise by stating that it was "the same raise as were given to other employees. . . . " It is important, then, to have the Respondents produce what the actual bonuses and raises were [that were] given to all of the other employees of the Respondents. The significance of Holub's bonus and raise is relevant to the Respondents' appraisal of Holub's work performance just prior to Holub informing the Respondents that he had contacted the NRC. Once the Respondents learned of Holub's cooperation with the NRC, then everything that he did was unsatisfactory. . . .

Addressing both the relevancy and confidentiality issues, *Gray v. Board of Higher Educ., City of New York,* 692 F.2d 901 (2d Cir. 1983), is somewhat instructive. Dr. Gray

was a African-American educator at LaGuardia Community College, who brought a civil rights action against his employer based on a denial of promotion and tenure. Seeking to discover the vote of two of the named defendants on his unsuccessful applications for promotion and tenure, Dr. Gray filed a motion to compel which was denied in federal district court, the judge holding that the confidentiality of the faculty peer review system should be protected. *Id.* at 902. I point out at this juncture that the discovery sought herein does not involve an issue of academic freedom and its attendant First Amendment considerations. The *Gray* case does, however, address the requirements of proof in employment discrimination cases and how those requirements impact discovery in situations where a privilege of confidentiality is sought by the party resisting such discovery.

The court began its analysis by noting that, "[i]n resolving the tensions between the opposed needs of disclosure and confidentiality we are reminded that the discovery rules are to be accorded broad and liberal treatment, particularly where proof of intent is required. *Herbert v. Lando,* 441 U.S. 153, 170--75, 99 S.Ct. 1635, 1645--48, 60 L.Ed.2d 115 (1979). To sustain a privilege there must be 'a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.' *Trammel v. United States,* 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980) . . . . *" Id*. at 904.

The Court of Appeals pointed out that, because Dr. Gray was required to show discriminatory intent to prevail, knowledge of the reasons underlying the faculty vote was crucial. I note that, in the instant case, Complainant has some idea as to Respondents' asserted reasons for the suspension and discharge: that it was discovered that he was a less-than-adequate employee. However, for Complainant herein to ultimately prevail, he must establish that those reasons are a pretext. One of the ways Complainant may accomplish this is to establish the pattern of his compensation vis-a-vis other employees, i.e., that his past excellence (according to Complainant) had resulted in monetary rewards. Respondents have countered Complainant's assertion in this regard by stating that all their employees have received raises and or bonuses. Under these circumstances, to deny disclosure of these asserted facts to Complainant would, in effect, deny him the opportunity[3] to prove -- "indirectly" an intent to discriminate. Clearly, the documents requested are relevant, and the Respondents' objection to them in that regard is denied.

[Page 20]

Insofar as Respondents argue that Complainant should be refused access to these documents because they are confidential, such motion is also denied. In this regard, I further decline to fashion a protective order with respect to request for production number 6. Thus, Respondents have provided absolutely nothing to support its protective order motion with respect to the requested payroll records, and I decline to tip the balance in favor of confidentiality herein in light of the highly relevant nature of the documents requested and the Respondents' failure to even provide a minimal rationale on which a protective order might be based.[4] The Respondents' objection and motion for a protective

order with respect to request for production number six is accordingly denied and Complainant's motion to compel is granted.

The next two requests for production, numbers 18 and 26, are also included in the Respondents' motion for a protective order. Request number 18 asks that Respondents provide, "[a]ll of Respondents' pending patent applications which relate to work performed by Edward P. Holub." Respondents object on the grounds that the documents requested involve trade secrets and/or other confidential research development or confidential information. Respondents also assert that these documents are not relevant to any allegation in the Complaint. The Complainant responds that, "[t]hroughout Holub's employment by the Respondents, he had made many discoveries and inventions for which he has received patents in his own name, and which patents were then assigned to the Respondents. In 1992, he prepared several patent applications for discoveries he had made. These discoveries and inventions go to the issue of whether Holub had performed, well for the Respondents, and whether, in view of his contributions to the Respondents' past and future product lines, there was any justification for his firing, except as a retaliation for his informing the NRC of the Respondents' activities. The pending patent applications would demonstrate what recent research work Holub had done."

The second request for production involving asserted trade secrets is number 26, which asks that Respondents provide, "[a]ll memoranda concerning how the formula for NBEC Nonshrink Grout had changed in 1991 or 1992." Respondents lodge the same objections - relevance, trade secrets and/or other confidential research development or confidential information -- as set forth above in request number 18. The Complainant responds as follows:

> One of the reasons given for firing Holub in the Respondents' letter of January 22, 1993 was a failure to maintain material safety data sheets (MSDS), which "jeopardized business" with a certain customer. This pretext for firing had been introduced in a memo from William Babcock to Edward Holub dated January 14, 1993, attached to the Complaint as Exhibit B, which Holub received on January 18, 1993. This memo had been written by William Babcock after he and two attorneys for the Respondents had questioned Holub for six hours on January 12, 1993 [regarding] what information he had given to the NRC. In that January 14, 1993 memo, William Babcock states that:
> It has just come to my attention that the MSDS sheets which you are responsible for have not been updated since 1989 and therefore do not meet regulations set forth by the Government. This may cost us a 4-truckload job in Texas which we are trying to salvage.

[Page 21]

> In his statement to the Wage and Hour investigator, William Babcock stated that, "in January 1993, Jeff Graveline, a tech service person, came to me and said our MSDS's are out of date and said a customer at an IBM job site had contacted him and that they would not accept our material -- NBEC nonshrink grout -onto the facility because the MSDS had not been updated.

> The Wage and Hour investigator, however, acquired a copy of the actual communication from the Texas customer dated January 7, 1993, and the Respondents' reply dated January 8, 1993 which . . . says that because the NBEC Nonshrink Grout formula and composition had not changed since 1989, no new MSDS needed to be issued. The Respondents' own January 8, 1993 letter to the customer in Texas is in direct contradiction to (what William Babcock later told the Wage and Hour investigator):
> These formulas (NBEC nonshrink grout) were changed in the 1991/1992 years. Therefore the MSDS sheets should have been updated.
> It is clear, however, from the Respondents' own letter of January 8, 1993 that the formula for NBEC Nonshrink Grout had not changed, and that the MSDS forms did not have to [be] updated.

With respect to the MSDS forms, Complainant states that the federal regulations, found at 29 C.F.R. § 1910.1200, "specify that MSDS forms should only be updated when there is a change in the product. Since the Respondents have now changed their story, and state that the NBEC Nonshrink Grout formula changed in 1991 or 1992, which would make the 1989 MSDS form outdated, they should be required to produce the documents which state how that formula changed. This would permit a determination to be made whether the 1989 MSDS form had to be updated pursuant to 29 C.F.R..1200. * * * "

Rule 2 6 (c) Fed.R.Civ.P. governs motions for protective orders. *See also* 29 C.F.R. § 18.15.[5]

As a preliminary matter, I shall address the procedural issue raised by Respondents' motion and its lack of supporting documentation. *Reliance Ins. Co. v. Barron's,* 428 F.Supp. 200 (S.D.N.Y. 1977), which involved a motion for a protective order based on the documents' asserted trade secret status, noted that, "[i]t is well established that the party seeking the order of confidentiality bears the burden of demonstrating the required 'good cause' supporting the issuance of such an order. *Davis v. Romney,* 55 F.R.D. 337 (E.D.Pa. 1972); *Hunter v. International Systems & Controls Corp.,* 51 F.R.D. 251 (D.C. 1970); *Essex Wire Carp. v. Eastern Sales Co., Inc.,* 48 F.R.D. 308 (E.D.Pa. 1969); and *Apco-Oil Corp. v. Certified Transportation Co.,* 46 F.R.D. 428 (W.D.Mo. 1969)." *Id.* at 202. The *Reliance* court continued:

> In *United States v. I.B.M.*, 6.7 F.R.D. 40, 46 (S.D.N.Y.), Chief Judge Edelstein of this District set forth the test by which to determine if commercial information warranted the protection of an order of confidentiality:
> "[T]he court adopts the position that where commercial information may be subject to protection under Fed.R.Civ.P. 26(c) it will look to determine if its disclosure will work a clearly defined and very serious injury."
> The court went on to declare that it would be guided in its decision by those considerations used when determining whether certain information should be classified as trade secrets. These considerations include, *inter alia*, (1) the extent

> to which information is known outside the business; (2)the extent to which information is known to those inside the business; (3) the measures taken to guard the secrecy of the information; and (4) the value of the information to the business and its competitors.

Id. at 202--03. Pointing out that Reliance Insurance Company's attempt to sustain its burden of proof regarding the confidential nature of the information it sought to protect consisted of "in large part . . . two attorneys' affidavits[,]" the court cited *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21, 23 (S.D.N.Y. 1973), holding that, "the hearsay allegations of an attorney's affidavit are insufficient to warrant issuance of a protective order." *Id*. at 203. The court noted, however, that it had "considered the allegations set forth in these affidavits, recognizing that, given time, plaintiff could produce non-hearsay affidavits to the same effect." *Id*. The court then discussed the potential effect of the plaintiff's failure of its burden of proof:

> As noted above, the plaintiff , as the moving party, is required to demonstrate good cause for the issuance of an order of confidentiality. To sustain its burden, plaintiff must show, specifically, that it "will indeed be harmed by disclosure. " *Johnson Foils, Inc. v. Huyck Corp.,* 61 F.R.D. 405, 409 (N.D.N.Y 1973). *United States v. I.B.M., supra,* demonstrates how difficult it is to sustain this burden. Here, plaintiff has made an insufficient showing both as to the confidentiality of the documents for which protection is sought, and as to the expected harm which would result from their release, thereby failing to sustain the burden of proof required in order to secure a protective order.
> If, however, this were the only argument against the order which plaintiff seeks, the Court would allow the contested documents to be submitted under seal for the *in camera* inspection of the Court, together with a statement as to the harm which each item might cause. see Maritime *Cinema Service Crop. v. Movies En Route, Inc.,* 60 F.R.D. 587 (S.D.N.Y. 1973); *Hunter v. International Systems ControIs Corp., supra*. . . .

Id. at 203--04.[6]

In the context of a case under the Freedom of Information Act, 5 U.S. C.

[Page 23]

§ 552, the Supreme Court addressed discovery of commercial and trade secret information, and stated as follows:

> Although the Domestic Policy Directives can fairly be described as containing confidential commercial information generated in the process of awarding a contract, it does not necessarily follow that they are protected against immediate disclosure in the civil discovery process. As with most evidentiary and discovery privileges recognized by law, "there is no absolute privilege for trade secrets and

> similar confidential information." 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2043, p. 300 (1970); 4 J. MOORE, FEDERAL PRACTICE, ¶ 26.60[4], pp. 26-242 (1970). *Cf. United States v. Nixon*, 418 U.S. 683, 705-07 (1974).

Federal Open Market Committee v. Merrill, 443 U.S. 340, 362 n.24 (1979). Citing *Federal Open Market Committee*, the 10th Circuit, has stated that, "[t]o resist discovery under Rule 26(c)(7), a person must first establish that the information sought is a trade secret [footnote omitted] and then demonstrate that its disclosure might be harmful. 8 C. WRIGHT, *supra*, § 2043 at 301." *Centurion Industries, Inc. v. Warren Steurer, etc.*, 665 F.2d 323, 325-26 (10th Cir. 1981). The court continued:

> If these requirements are met, the burden shifts to the party seeking discovery to establish that the disclosure of trade secrets is relevant and necessary to the action. . . *Hartley Pen Co. v. United States District Court,* 287 F.2d 324, 331 (9th Cir. 1961). The district court must balance the need for the trade secrets against the claim of injury resulting from disclosure. 6 [6 "The need for accommodation between protecting trade secrets, on the one hand, and eliciting facts required for full and fair presentation of a case, on the other hand, is apparent. Whether disclosure should be required depends upon a weighing of the competing interests involved against the background of the total situation, including consideration of such factors as the dangers of abuse, good faith, adequacy of protective measures, and the availability of other means of proof." *Advisory Committee Note* to Rule 5-08 of the proposed FEDERAL RULES OF EVIDENCE, 46 F.R.D. at 271.] *Covey Oil Co.*, 340 F.2d at 999. If proof of relevancy or need is not established, discovery should be denied. *See id.* at 998--99; *Cleo Wrap Corp. v. Elsner Engineering Works Inc.,* 59 F.R.D. 386, 388 (M.D.Pa 1973); *Hartley Pen Co.*, 287 F.2d at 330--31. On the other hand, if relevancy and need are shown, the trade secrets should be disclosed unless they are privileged or the subpoenas are unreasonable, oppressive, annoying, or embarrassing. *Covey Oil Co.,* 340 F.2d at 997--98.
>
> It is within the sound discretion of the trial court to decide whether trade secrets are relevant and whether the need outweighs the harm of disclosure. Likewise, if the trade secrets are deemed relevant and necessary, the appropriate safeguards that should attend their disclosure by means of a protective order are also a matter within the trial court's discretion..... [Citations omitted].

[Page 24]

Id. at 325--26. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.,* 529 F.Supp. 866 (E.D.Pa. 1981), also addressed disclosure of trade secrets, including the types of harm cognizable under Rule 26, and discussed the burdens borne by each party to a discovery dispute. The court stated as follows:

> The party seeking a protective order bears the burden of showing good cause for the order to issue. *Reliance Ins. Co. v. Barron's,* 428 F.Supp. 200 (S.D.N.Y.

> 1977); *Davis v. Romney,* 55 F.R.D. 337 (E.D.Pa. 1972); *Hunter v. International Sys. & Controls Corp.,* 51 F.R.D. 251 (W.D.Mo. 1970); *Essex Wire Co. v. Eastern Sales Co.,* 48 F.R.D. 308 (E.D.Pa. 1969). In order to establish good cause, it must be shown that disclosure will work a clearly defined and serious injury, *Essex Wire Co., supra; United States* v. Lever *Bros. Co.,* 193 F.Supp. 254 (S.D.N.Y. 1961), *cert. denied,* 371 U.S. 932, 83 S.Ct. 310, 9 L.Ed.3d 272 (1962)[footnote 43 discussed below], and that the party resisting disclosure "will indeed be harmed by disclosure." *Johnson Foils, Inc. v. Huyck Corp.,* 61 F.R.D. 405, 409 (N.D.N.Y. 1973). *Accord, Reliance Ins. Co., supra.*

Id. at 890-91. The court then addressed how these burdens may be satisfied:

> It has been held that in order to show good cause, the injury which allegedly will result from disclosure must be shown with specificity, and that conclusory statements to this effect are insufficient. *United States v. Hooker Chem. & Plastics Corp.,* 90 F.R.D. 421 (W.D.N.Y. 1981); *Rosenblatt v. Northwest Airlines, Inc.,* 54 F.R.D. 21 (S.D.N.Y. 1971); *Hunter, supra; Technical Tape Corp. v. Minnesota Mining & Mfg.* Co., 18 F.R.D. 318 (S.D.N.Y. 1955). It has also been held that the specific instances where disclosure will inflict a competitive disadvantage should be set forth in more than the briefs or the hearsay allegations of counsel's affidavit, for a protective order should not issue on that basis alone. *See Reliance Ins. Co. v. Barron's, supra; Rosenblatt v. Northwest Airlines, Inc., supra; Apco Oil Corp v. Certified Transp., Inc.,* 46 F.R.D. 428, 432 (D.Mo. 1969); *Paul v. Sinnott,* 217 F.Supp. 84 (W.D.Pa. 1963). We think, however, that hard and fast rules in this area are inappropriate. Frequently the injury that would flow from disclosure is patent, either from consideration of the documents alone or against the court's understanding of the background facts. The court's common sense is a helpful guide.

Id.[7]

The problem to be addressed, however, is that Respondents, for their part, have failed utterly to meet their procedural burden of establishing good cause to support their motion for a protective order, having offered only a bare-bones conclusory statement that the documents of which Complainant seeks production are "trade secrets" and "confidential." Indeed, with respect to the pending patent applications, they might be viewed from two perspectives: If the application is pending, then it may already be a matter of public record; or, if pending, public

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disclosure may not as yet have been made. Unfortunately, Respondents have not seen fit to enlighten the court as to the status of these documents and how disclosure will harm Respondents. Similarly, Respondents have provided no substantive information as to how they will be harmed by disclosure of the nonshrink grout formula. Further, Respondents

have not addressed how or whether the patent applications or the nonshrink grout formula or formulae satisfy the definition of "trade secret."[8]

While the law is clear that the motion for a protective order could be summarily denied based on Respondents' failure to meet the "good cause" burden of proof, I shall decline to do so, following the court's lead in Reliance *Ins. Corp. v. Barron's,* 428 F. Supp. at 203, 204 ("To sustain its burden, plaintiff must show, specifically, that it 'will indeed be harmed by disclosure.' *Johnson Foils, Inc. v. Huyck Corp.,* 61 F.R.D. 405, 409 (N.D.N.Y. 1973). United *States v. I.B.M., supra,* demonstrates how difficult it is to sustain this burden."). Rather, I shall order an *in camera* inspection along with non-hearsay affidavits, i.e., not attorney affidavits, regarding whether or not harm will result from disclosure of the documents sought in the request for production numbers 18 and 26. The court will rely on "serious harm," which seems to be the more widely accepted standard, rather than "very serious injury" (United *States v. IB.M.,* 67 F.R.D. at 46) in determining whether Respondents meet their "good cause" burden.[9]

On June 1, 1993, Complainant filed a motion to depose 29 of Respondents I employees. These individuals are as follows: H. Nash Babcock, William Babcock, Mark Hazzard, Henry Allen, Paul Babin, William Ballou, Robert Camara, Douglas Cheney, Jerome Chopskie, Janet Cavaleski, Janice Frattaroli, James Golden, Richard Grabowski, Jeffrey Graveline, Glen Johnson, Diane Marrone, John Mount, Christopher McCabe, Daniel McFarlane, Karen Nichio, Stanley Nowacki, Charlie Peterson, John Richardson, Joseph Rizzo, Susan Settino, Carol Wiggins, David Babcock, Patricia Chester and Gregory Melnitsky. The Complainant asserts that, "[s]uch discovery is necessary to prove that the Respondents' alleged grounds for the firing of the (Complainant) were a pretext and without any basis."

Respondents filed a second motion for a protective order, which states as follows:

> The Respondents, H. Nash Babcock, et al., move the Administrative Law Judge..... for an order directing that the depositions referred to in [Complainant's Motion served on June 1, 1993] be limited.
> The employees listed by [Complainant]..... include individuals whose testimony is irrelevant, immaterial and unduly repetitious. The extensive list of 31 employees who[m] Complainant] seeks to depose includes, but is not limited to, the receptionist at the Respondents' facility, various members of the clerical staff at the Respondents' facility and the maintenance man at the Respondents I facility. It is clear that an excessive and unwarranted broad-based discovery request of this kind is not only

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[Page 26]

> "overly broad" but is tantamount to harrassment [sic] and is within the Administrative Law Judge[']s decision [sic?] to limit. Accordingly, the Respondents respectfully move that the Administrative Law Judge limit the depositions to which [Complainant] refers . . . .

On June 18, 1993, Complainant filed an objection to this second motion for a protective order. Noting that Holub was a chemist for the Respondents for approximately 13 years, and that he was suspended from his position as Director of Research within hours after he told the Respondents that he had been the one who contacted the NRC earlier in the year, and subsequently fired, the Complainant set forth its reasons for seeking to depose the abovenamed individuals. The Complainant states as follows:

> Five of the person to be deposed are officers of the Respondents: H. Nash Babcock, William Babcock, Mark Hazzard, William Ballou and David Babcock. They all have valuable information as to the real reasons for the . . . (discharge) and what decision-making activities went on concerning the Complainant's suspension..... and his [discharge] .
> Henry Allen, who was in tech sales, had knowledge of material safety data sheets (MSDS), when MSDS' were used by the Respondents, and how and who would prepare them. The failure to update MSDS' has been used by the Respondents as a pretext to justify the [discharge] . . . .
> Paul Babin, who also worked in sales, can testify about how the NRC announcement to the industry on September 1, 1992, as a result of information given to the NRC by Holub, caused the Respondents to lose numerous orders, including orders from Brown & Root. This goes to [motivation for the suspension and discharge].

With respect to Douglas Cheney, an engineer, and Robert Camara, a chemist, Complainant notes that both worked under Holub. Complainant states that they will be able to testify regarding lab book procedures and that Respondents regularly saw these books. The Complainant notes that, "[a] pretext for firing Holub was that he did not sign as a witness in laboratory notebooks . . . ."

Complainant states that Jerome Chopskie, the head of shipping, is aware of the use of MSDS' and when and how they are updated. Janice Cavaleski, Respondents I receptionist, and Janice Frattaroli of marketing are assertedly aware of Respondents' asserted harassment of Holub. Complainant notes that James Golden, in sales, "can testify as to the negative impact that the NRC had on the sales of Respondents I products to the nuclear industry, and that these same products were having failures."

The Complainant continues:

[Page 27]

> Richard Grabowski, manager of quality assurance, can describe why the Respondents I quality assurance did not meet the standards of 10 C.F.R. 50, even though such claims were being made to the nuclear industry. He can describe what impact the NRC inspection had on sales, and particularly how the Respondents removed any reference to 10 C.F.R. 50 from their sales literature. [He] can testify as to the procedure for keeping laboratory notebooks, and how they were being filled out, and that the Babcock's regularly saw them.

> Jeffrey Graveline, in technical sales, can describe the communication from the Texas customer on January 7, 1993, and his response on January 8, 1993 on MSDS' for the..... NBEC Nonshrink Grout, which has been used as a pretext by the Respondents to fire Holub.
> Glen Johnson, a maintenance man, was aware of all notices posted on the Respondents' bulletin boards warning employees not to talk to Holub. He was also aware of the things that officers of the Respondents were saying about Holub.

With respect to Diane Marrone, she served as secretary to Holub, Stanley Nowacki and Richard Grabowski. Complainant notes that she gave statements to Wage and Hour regarding MSDS' which must be clarified. The Complainant states that, "John Mount, a sales manager, can confirm the effect that the NRC inspections and notification had upon sales of the Respondents' products for the nuclear industry. . . . " With respect to Christopher McCabe, a lab tech, Complainant states that he would have knowledge of how laboratory notebooks were prepared and about Holub's efforts to keep a "curing cabinet" for the proper testing of nuclear grade products. Complainant also states that Dan McFarlane of accounting "can testify as to the return of curing cabinet . . . . " The Complainant states that Stanley Nowacki will be able to testify as to the preparation of the laboratory notebooks and how the Babcock's regularly reviewed them, and "[t]his goes to the issue of whether Holub should have been fired on January 22, 1993 for not witnessing laboratory notebooks for the past 13 years." The Complainant offered reasons for its need to depose the following employees:

> John Richardson and Joseph Rizzo in sales can testify as to the impact that the NRC inspection had on sales to the nuclear industry, and how certain customers asked for special certifications that the products met the advertised standards. This would go to the issue that the Respondents were substantially troubled by the NRC, and [Respondents' motivation] . . . .
> Susan Settino, Patricia Chester and Carol Wiggins are senior secretaries to the Respondents, and were aware of the efforts to get rid of Holub once he disclosed that he had been cooperating with the NRC . . . .
> Gregory Melnitsky, a lab tech, knows of the Respondents' procedure as to the preparation of laboratory notebooks.

In a supplemental objection to the motion for a protective order filed June 29, 1993, Complainant addressed the relevance of two prospective witnesses that it had omitted from

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its initial response:

> Charlie Peterson is in the Respondents' accounting department. He witnessed . . . Mr. Hazzard's conversation with Mr. Holub on January 18, 1993 . . . .

> Karen Nichio is in the Respondents I shipping department and can testify to the fact that material safety data sheets (MSDS) are sent with every order, and when new MSDS' are prepared.

On January 18, 1994, Complainant moved to depose an additional employee, William Marano, "whose name appears as a signatory on several supply contracts between the Respondents and licensees of the Nuclear Regulatory Commission (NRC) . His testimony would involve what contracts or subcontracts the Respondents had with NRC licensees and is relevant to the issue of jurisdiction under Title 42 U.S.C. Section 5851." It is assumed that Respondents would include this employee in its motion for a protective order.

Suffice it to say, based on the extensive discussion above regarding the burdens to be met with respect to a protective order, that Respondents have not, in any fashion, shown good cause within the meaning of Rule 2 6 (c) . In the event that this finding is reviewed on appeal, I find that the evidence sought to be elicited from the above-named witnesses is both relevant and necessary to the Complainant's case, and that in any balancing of the Complainant's needs against those of Respondents, the great weight is on the side of Complainant. *See Reliance Ins. Co. v. Barron's,* 428 F.Supp. 200. Accordingly, Respondent's motion for a protective order in this regard is denied, and Complainant's motion to compel is granted.

On January 18, 1994, Complainant filed a motion to compel compliance with production, specifically with respect to the following document requests:

> 4. All of Respondents' written guidelines and job descriptions on who is responsible for completing the MSDS (material safety data sheets] and when the MSDS should be revised or updated.
> 21. All written job descriptions for all positions held by Edward P. Holub during his employment by the Respondents.
> 22. All memoranda concerning written job descriptions for all positions for which the Respondents had employees from 1983 to the present time.

Complainant correctly notes that Respondents did not object to these requests for production, and indeed, stated that they intend to comply with the request. Complainant states that, "[t]o date, the Respondents have failed to provide any documents or discovery materials with regard to these Paragraphs 4, 21 and 22."

Respondents filed a response on February 3, 1994, stating as

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follows:

> 1. On June 8, 1993 Respondents filed objections to and responses to [Complainant's] request for production.
> 2. Paragraphs 4, 21. and 22 of Petitioner's request sought particular documents and memorandum [sic], to which the Respondent[s] responded that it intended to comply.
> 3. The Respondents have in fact complied with the requests set forth in paragraphs 4, 21 and 22 in that no documents exist now or have ever existed which would fall within the scope of the requests set forth in paragraphs 4, 21 and 22. The Respondents did not object to the requests because an objection would have been without merit and been erroneous under the circumstances.1 Accordingly, the Respondents respectfully submit this response to the [Complainant's] motion to compel compliance with production on the grounds that it has complied with the requests set forth in paragraph 4, 21 and 22 by virtue of the fact that no documents exists [sic] or have ever existed which fall within the scope of these requests.
>
> _____
>
> 1 Respondents note that had counsel for the [Complainant] discussed this issue with counsel for the Respondent[s], this apparent misunderstanding could easily have been avoided. *See, e.g.*, D. Conn. Local Civil Rule 9(d)(4). It is clear, however, that the [Complainant] is more interesting [sic] in filing documents that [sic] in resolving the issues.

The short answer to Respondents I response is that, having stated with respect to request for production numbers 4, 21 and 22, that, "[t]he Respondents intend to comply with the request for production 4[, 21 and 22]," without more, Respondents now fall within the ambit of Rule 26(e), recently amended on December 1, 1993. This rule, entitled, "*Supplementation of Disclosures and Responses,"* states in relevant part as follows:

> A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:
> (1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. . . .

[Page 30]

> (2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

The notes to subdivision (e) reflect a revision to provide that the requirement for supplementation applies to all disclosures required by 26(a)(i)--(3). The notes continue:

> Like the former rule, the duty, while imposed on a "party, applies whether the corrective information is learned by the client *or by the attorney*. Supplementation need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period and with special promptness as the trial date approaches. it may be useful for the scheduling order to specify the time or times when supplementation should be made.
> The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony . . . .
> The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

(Emphasis supplied). **FEDERAL PRACTICE AND PROCEDURE,** 1993 *Special Supplement* (West Publishing Co.), at 50.

Contrary to Respondents' counsel, the plain meaning of the words, "intends to comply" means just that, and no amount of semantic machination justifies the failure to inform Complainant that such documents do not exist. In this regard, pleading nonexistence of documents does not also require a formal objection. Respondents' counsel, however, contends that the converse is the case, i.e., that stating he intends to comply with the request subsumes an assertion that the documents do not exist, and that to lodge an objection would be error. Respondents' logic, in this regard, is misplaced. I find that Rule 26(e) applies herein, and according Respondents' counsel the benefit of the doubt, i.e., that he believed that the documents existed at the time he provided the answers to the interrogatories, he had the obligation to inform Complainant that, in fact, the documents do not exist. Thus, knowing whether or not such documents exist is crucial to the Complainant so that he can then explore how the information he needs might be obtained in some other way. In this regard, I note that this issue may be properly explored by

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Complainant when deposing Respondents' officers, agents and employees. However, because discovery is still in process, Respondents' failure to inform is, essentially, harmless. I nonetheless caution Respondents, that the court expects compliance with Rule 26(e) from this point in the proceedings.[10]

Finally, I address Respondents' motion for a discovery conference, which states as follows:

> The Respondents . . . hereby request that a conference regarding the discovery requests filed by the [Complainant] on May 17, 1993 be held before the Administrative Law Judge to whom this case is assigned, on the grounds that much of the discovery requested by the [Complainant] including, but not limited to, depositions and production requests, are irrelevant, overbroad and unduly burdensome, vague and involve information which are trade secrets or confidential research development information, and furthermore, are designed not to obtain discoverable information but to harrass [sic] the Respondents. WHEREFORE, the Respondents respectfully move for an order scheduling a discovery conference with regard to the outstanding discovery in this action.

Respondents I motion raises an interesting procedural point. At the time the motion was made, Rule 26(f), relating to discovery conferences, was discretionary with the judge, used sparingly, and required that the moving party meet certain specific requirements, *i.e.*, "(1) a statement of the issues as they then appear; (2) a proposed plan and schedule of discovery; (3) any limitations proposed to be placed on discovery; (4) any other proposed orders with respect to discovery; and (5) a statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. . . . " FED. R. CIV. P. Rule 26(f). Respondents met none of these requirements, and, indeed, has viewed Complainant's discovery requests as harassment. Further, as has been discussed at length above, Respondents have, in certain instances, not met their burden of proof, or skirted the edge of sufficiency in their answers.

Discussing Rule 26(f), *McCluney v. Jos. Schlitz Brewing* Co., 504 F.Supp. 1264 (E.D.Wisc. 1981), noted that this rule was "designed to provide a framework to alleviate discovery abuses. The notes of the advisory committee on the Federal Rules stated: 'It is not contemplated that request for discovery conferences will be made routinely. A relatively narrow discovery dispute should be resolved by resort to Rule 2 6 (c) [protective orders] or 37 (a) [orders to compel].'" *Id*. at 1270.[11]

Subsequent to Respondents' motion for a discovery conference, Rule 26(f) was amended on December 1, 1993, and what was styled pre-amendment as a "Discovery Conference," is now entitled "Meeting of the Parties: Planning for Discovery." "Except in actions exempted by local rule or when otherwise ordered," the new Rule 26(f) provides, *inter alia*, for a meeting among the parties, "to discuss the nature and

basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a) (1) , and to develop a proposed discovery plan..... " FEDERAL PRACTICE AND PROCEDURE, 1993 Special Supplement (West Publishing), at 43. The advisory committee notes are instructive:

> The provisions relating to a conference with the court are removed from subdivision (f). This change does not signal any lessening of the importance of judicial supervision. . . . Rather, the change is made because the provisions addressing the use of conferences with the court to control discovery are more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process.

Id. at 50. All that being said, and in light of Respondents' blanket objections to clearly relevant discovery requests, marginally sufficient answers, unfounded claims of harassment, as well as semantic gamesmanship, it is ironic that Respondents are the party seeking a discovery conference. Indeed, the sole basis for Respondents' motion is their assertion that Complainant is engaging in unfair and abusive discovery, "not to obtain discoverable information but to harrass (sic] the Respondents." Thus, Respondents have given no indication that they would view a discovery conference as anything other than an additional forum in which to press their claims of harassment. Under these circumstances, and in light of the court's fully explicated substantive discovery rulings as to relevance and other issues, it is abundantly clear that this case presents a situation which can be easily accommodated by resort to Rules 2 6 (c) and 3 7 (a) . Indeed, this court has, in the context of the order herein, done just that. Respondents' request for a discovery conference is accordingly denied.

ORDER

1. Respondents I motion for a protective order seeking to prevent the Complainant from deposing Respondents' officers, agents and employees is DENIED.

2. Respondents' motion for a protective order seeking to deny Complainant access to all payroll records of Respondents from 1983 to present (Complainant's request for production number six), is DENIED.

3. Respondents' motion for a protective order seeking to deny Complainant access to all of Respondents' pending patent applications which relate to work performed by Edward P. Holub (Complainant's request for production number 18), and all memoranda concerning how the formula for NBEC Nonshrink Grout had changed in 1991 or 1992 (Complainant's request for production number 26) is neither granted nor denied at this time. Respondents are ORDERED to submit copies of the above-cited contested documents to the Court, under seal, for the *in camera* inspection of the Court, together with supporting non-attorney affidavits as to the harm which each document might cause, by close of business, Monday, April 11, 1994.

4. Respondents' motion for a discovery conference is DENIED.

[Page 33]

5. Complainant's motion to compel, in all other respects, is GRANTED, and discovery shall proceed forthwith.

6. Complainant and Respondents are ORDERED to submit a date or dates by which time it is contemplated that discovery will be completed, taking into account that a final ruling on Respondents' motion for a protective order has been held in abeyance. See ¶ 3, above. Complainant and Respondents are further ORDERED to submit proposed dates as to when this matter might be set down for trial. These submissions are to be received by the Court by close of business, Monday, April 11, 1994.

JOAN HUDDY ROSENZWEIG
Administrative Law Judge

Dated: March 2 1994
Boston, Massachusetts

[ENDNOTES]

[1]*Roesberg* was specifically followed in *Compagnie Francaise D'Assurance v. Phillips* Petro., 105 F.R.D. 16 (S.D.N.Y. 1984).

[2]*But see Securities and Exchange Com'n. v. Samuel H. Sloan & Co.,* 369 F.Supp. 994 (S.D.N.Y. 1973). This case involved a Rule 34(b) motion by Sloan seeking to require the SEC to produce for inspection and copying the transcript of a hearing before an administrative law judge of that agency to which Sloan was a party. Sloan was represented by counsel. A transcript of the hearing was prepared by a reporter, and all parties were entitled to purchase a copy of the transcript. Sloan chose not to do so. The court noted that, "[a]t the conclusion of the hearing, the parties were called upon to file proposed findings of fact and conclusions of law. The Commission, which had purchased a copy of the transcript, allowed Sloan's counsel to come to its offices and examine its copy of the transcript while he was preparing his proposed findings." *Id.* at 995. The administrative law judge found for the Commission and against Sloan. Sloan filed a petition for review with the Commission, and Sloan's counsel asked that the Commission release the transcript for a period of one week for his use. The commission refused, and Sloan filed a Rule 34 motion, seeking to obtain by discovery what he had declined to purchase. The court stated as follows:

> It is well established that discovery need not be required of documents of public record which are equally accessible to all parties. *Komov v. Simplex Cloth Cutting Machine Co.,* Inc., 109 Misc. 358, 179 N.Y.S. 682 (1919), *aff'd.,* 191 App.Div. 884, 180 N.Y.S. 942 (1920). The court in *Komov* held that a party is not entitled

> to discovery and inspection of matters of public record and denied plaintiff's motion for discovery and inspection of the certificate of incorporation of defendant corporation. The [administrative hearing] transcript is available to anyone, including Sloan, by purchase from CSA Reporting Service. Like the certificate of incorporation in *Nomov* the requested transcript is a public document available to movant and thus, not discoverable from the commission.

Id. at 995--96. Distinguishing Sloan's situation from that of an indigent defendant in a criminal proceeding, the judge concluded as follows:

> To grant Sloan's motion would in the future allow all respondents in administrative proceedings, regardless of how many parties may be involved, to obtain a copy of the transcript on motion, thereby requiring the Commission to purchase additional copies of the transcript and placing an undue burden on the Commission.

Id. at 996.

I find *Sloan* to be distinguishable from the procedural facts herein. Thus, Sloan sought a transcript of a proceeding to which he was a party, and for no reason other than to obtain a copy of that transcript gratis. By contrast, Complainant herein seeks a transcript of a proceeding to which he was not a party, and which may contain evidence relevant (within the meaning of Rule 26) to the instant case. Further, I find the *Komov* citation inapposite to the case herein. I note initially that *Komov* was decided almost two decades prior to the adoption of the Federal Rules of Civil Procedure, and respectfully suggest that it does not stand for the broad proposition for which it was cited. Thus, "it is not usually ground for objection that the information is equally available to the interrogator [footnote omitted] or is a matter of public record (footnote omitted]." 8 WRIGHT & MILLER § 2014, at 111. *See Riordan v. Ferguson ,* 2 F.R.D. 349 (S.D.N.Y. 1944), *Canuso, v. City of Niagara Falls,* 4 F.R.D. 362 (W.D.N.Y. 1945), *Blau v. Lamb*, 20 F.R.D. 411 (S.D.N.Y. 1957). *See also Rogers v. Tri-State Materials Corp.,* 51 F.R.D. 234 (D.C.W.Va. 1970), stating that, "[i]n 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 766, pages 299-300 (1961), the writers state[,] 'The fact that the information is already known to the interrogator is not a valid ground for objection to the interrogatories. Interrogatories are not limited to facts which are exclusively or peculiarly within the knowledge of the interrogated party. The fact that the information sought is a matter of public record, does not render the interrogatories objectionable. * * *.'" *Id.* at 245.

[3]The *Gray* court noted that Dr. Gray might prove intent to discriminate if he could show that the faculty in question harbored a racial animus against him and that this was manifested in the negative reappointment and tenure votes, but that he would have to know the votes. "Or, he could establish that the reasons given by the . . . committee for its actions were pretexts for its refusal to rehire and tenure him -- if the committee had given reasons. 8 [8 Only if defendants explicate the reasons for the denial of reappointment with tenure can Gray proceed to meet his burden of proof that the nondiscriminatory motives advanced by the defendants are merely pretextual. . . . *McDonnell Douglas Corp.*

v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) . . . .]." The court continued:

> Once Gray has established a *prima facie* case, the burden shifts to defendants, note 8 *supra,* to articulate with reasonable specificity the reasons for the denial of tenure and to produce some evidence in support thereof. If defendants fail to do so the court will be required to enter judgment for Gray. If they discharge that burden, the burden will shift back to Gray to prove discrimination either directly (i.e., by persuading the court that a discriminatory reason more likely than not motivated the defendants) or indirectly (i.e., by showing that the proffered nondiscriminatory reason is mere pretext).

(Emphasis supplied). Id. at 905. The Gray court put it most succinctly: "Merely by furnishing an after-the-fact statement of reasons the defendants cannot fill the void left by the Committee's conclusory decision, (footnote omitted) especially in light of the fixed policy against giving such reasons. But if unable to engage in discovery, Dr. Gray cannot prove intent, and without proof of intent, he has no case." *(Emphasis supplied). Id.* at 906

[4]The *Gray* court noted that, "[w]hile we have the flexibility to adopt rules of privilege on a case-by-case basis, [citation omitted], we believe a cautious approach preferable. While we will not adopt such a rule (i.e., a protective order) here, we do not decline to do so because the party claiming privilege has failed to show a 'compelling justification' for it, as held in In *re Dinnan,* 661 F.2d 426, 430 (11th Cir. 1981), *cert. denied, sub nom. Dinnan v. Blaubergs,* __ U.S. __, 102 S.Ct. 2904, 73 L.Ed.2d 1314 (1982).[Footnote omitted). Rather we prefer the balancing approach taken by the district court, 92 F.R.D. at 90; (footnote omitted] we simply strike the balance in this case differently." *Gray,* 692 F.2d at 904--05. While the *Gray* court noted at footnote six that *Dinnan* compelled discovery of a faculty tenure committee member's vote, and that they would express no opinion as to the *Dinnan* result, the Gray court stated that, "we think the opinion accords too little weight to the concerns for confidentiality in the academic tenure decision-making process." *Id.* at 904--5, n.6. The case herein involves neither academic freedom nor freedom of speech; and I again make note that Respondents have "provided no justification for their position, compelling or otherwise.

[5]The 1993 amendments to the Federal Rules of Civil Procedure have added a requirement to be met by any party seeking a motion for a protective order. That additional language is shown in bold type as follows:

> Upon motion by a party or by the person from whom discovery is sought, **accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute-without court action,** and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

> (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way . . . .

See also 29 C.F.R. § 18.15(a) (6), which does not include the above-cited amended language.

[6]The court declined to grant the motion for a protective order based on First Amendment considerations.

[7]At footnote 43, the *Zenith* court discussed the degree of injury required to be shown to support a request for a protective order. They noted that, "'[v]ery serious injury' was required in *United States v. International Business Mach. Corp.,* 67 F.R.D. 40 (S.D.N.Y. 1975). *Accord, Citicorp* v. *Interbank Card Ass'n.,* 478 F.Supp. 756 (S.D.N.Y. 1979); *Reliance Ins. Co., supra.* We question the appropriateness of and necessity for the higher standard, under Rule 26(c)(7) . . . . * * * The 'very serious injury' standard of *United States v. I.B.M.* may be limited to the particular facts of that case. Judge Edelstein was confronted with a request that disclosure be limited in the fact of the Publicity in Taking Evidence Act, 15 U.S.C. § 30 (1970), which mandated that depositions taken in a suit brought by the United States under the antitrust laws be open to the public. That statute if of no effect in the case before us." *Id*. at 891, fn.43.

A review of Chief Judge Edelstein's opinion, however, reflects that he considered a broad range of precedent in reviewing the circumstances under which confidential or trade secret information should be considered *in camera.* Noting that while courts have traditionally protected trade secrets, "the case law does not articulate what showing should be made by one seeking in *camera* treatment." *United States v. I.B.M.,* 67 F.R.D. at 45. He did look for guidance to proceedings before the Federal Trade Commission. He continued:

> In hearings before the Federal Trade Commission (FTC) certain commercial data has also received in camera treatment despite the fact that the FTC deems that these proceedings are required to be public. *H.P. Hood & Sons, Inc.,* 58 F.T.C. 1184, 1186 (1961). To this end the FTC is guided by its rule of practice, 16 C.F.R. § 3.45 (1974), which states that in those unusual and exceptional circumstances when good cause is found[,] documents and testimony offered in evidence may be placed *in camera.* Good cause is shown when the party seeking protection demonstrates that disclosure of the documentary evidence at issue will result in a clearly defined, serious injury to the person or corporation whose records are involved. *H.P. Hood & Sons, Inc., supra; Graber Manufacturing Co. v. Dixon,* 223 F.Supp. 1020 (D.D.C. 1963); *The Crown Cork & Seal Co.,* 71 F.T.C. 1714 (1967). The disclosure of a secret formula will almost invariably result in this injury, 58 F.T.C. at 1188--89, but the disclosure of two-and-a-half-year-old sales data will not. 71 F.T.C. at 1714.

Id. at 46.

[8]Chief Judge Edelstein also addressed the definition of "trade secret" as it appears in Section 757 of the Restatement of Torts. He stated as follows:

> There it is suggested that a trade secret is any "formula, pattern, device or compilation of information which is used in one's business, and which gives him [or her] an opportunity to obtain an advantage over competitors who do not know or use it . . . . It differs from other secret information in a business..... in that it is not simply information as to single or ephemeral events in the conduct of the business, as . . . the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made . . . or the date fixed for the announcement of a new policy or for bringing out a new model . . . ." It is suggested that a secret be in continuous use in the business and may relate to the production of goods or to the sale of goods such as a code for determining discounts, rebates, or a list of specialized customers. The Restatement continues that a trade secret must be secret, communicated to others under pledge of secrecy. It then lists the factors of secrecy to be considered when determining if given information should be treated as a trade secret..... The Restatement definition has been supported in both state and federal courts. [Citations omitted].

United States v. I.B.M., 67 F.R.D. at 46, fn. 9. *See also* page 31, *supra.*

[9]Although Respondents bear the initial burden of proving serious harm, I find that Complainant has nonetheless shown the relevance of, and need for, the requested documents. Thus, they are crucial to a showing of pretext and motivation for Complainant's suspension and discharge. The only issues to be addressed by the court is whether full disclosure will seriously harm Respondents, and, if so, the balancing of relevance and need by Complainant against serious harm to Respondents, and the scope of a protective order, if any. *See generally Deitchman v. E.R. Squibb & Sons, Inc.,* 740 F.2d 556 (7th Cir. 1984), which notes that a protective order can be fashioned so as to provide one party with the information required without doing needless harm to the confidentiality interest involved.

[10]I note merely in passing that Respondents' citation of D.Conn. Local Civil Rule 9(d)(4) appears to be somewhat of a *non sequitur*. Thus, the text of that section states that, "[w]here a party has sought or opposed discovery which has resulted in the filing of a motion, and that party's position is not warranted under existing law and cannot be supported by good faith argument for extension, modification or reversal of existing law, sanctions will be imposed in accordance with applicable law. If a sanction consists of or includes a reasonable attorney's fee, the amount of such attorney's fee shall be calculated by using the normal hourly rate of the attorney for the party in whose favor a sanction is imposed, unless the party against whom a sanction is imposed can demonstrate that such amount is unreasonable in light of all the circumstances." RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, 1994 (West Publishing Co.) , at 917. In any event, local rules of Federal District Courts do not generally control.

[11]*But c.f. Union City Barge Line*, *Inc. v. Union Carbide Corp.,* 823 F.2d 129 (5th Cir. 1987). While endorsing the use of Rule 26(f) discovery conferences, the court noted that, "[a]pparently, the admonition against overuse has been heeded. In a survey of reported litigation, less than fifty cases have resorted to it (footnote omitted]." at 134. The court also recognized that the Third, Eights and Seventh Circuits have recognized the rule with approval and encouraged its use in an appropriate case. It is interesting to note, however, that in *Union City,* the party moving for the discovery conference was the one which was unable to proceed with discovery ("Union City [Plaintiff] noticed twenty depositions and was able to take but two. Union City attempted but was unable to depose any representative of Carbide or Gulf Coast. Union City filed three motions to compel discovery and moved for a protective order to use (confidential] discovery from a related case [footnote omitted]. In response, defendants filed eight motions seeking protective orders, to quash subpoenas and to stay discovery." *Id*. at 135). It is noted that the case herein presents the converse situation.